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OFFICE OF GENERAL
COUNSEL

VIA E-MAIL AND U.S. POSTAL SERVICE

Mr. Jeff S. Jordan
Supervisory Attorney
Federal Election Commission
999 E Street, NW
Washington, DC 22210

Re: Pre-MUR 520

Dear Mr. Jordan:

Senator John Ensign, through counsel, hereby responds to your letter, dated May 19, 2011 (the "Pre-MUR Notice"), notifying Senator Ensign, Ensign for Senate, and Battle Born Political Action Committee that the Federal Election Commission (the "Commission") has initiated Pre-MUR 520.¹ This matter, which arises from the \$12,000 monetary gifts that Michael and Sharon Ensign each provided to Doug Hampton, Cynthia Hampton, Brandon Hampton, and Blake Hampton on April 7, 2008 (the "Gifts" or "Payment"), was initially considered in MUR-6200 and dismissed by the Commission on November 16, 2010. As stated in your letter, the Commission believes it now has information in its possession that suggests that Senator Ensign "caused Michael and Sharon Ensign to make a severance payment to Cynthia Hampton," former treasurer of Ensign for Senate and Battle Born Political Action Committee (collectively the "Committees").² As discussed further herein, this new information does not change the

¹ Since the information and responses that could be provided by Senator Ensign, Ensign for Senate, and Battle Born Political Action Committee would be substantially similar, and each respondent is represented by the same counsel, such information and responses are incorporated herein in lieu of filing three separate responses.

² Although the Commission has not specifically identified the "information now in the Commission's possession" that warranted the initiation of Pre-MUR 520, Senator Ensign presumes that the Commission is referring to

fundamental character of the Payment, which was, and remains, gifts that were not related to Cynthia Hampton's employment by the Committees or any expense or debt that the Committees would have otherwise incurred.

I. PROCEDURAL BACKGROUND

The Committees received notice of a complaint filed by Citizens for Ethics and Responsibility in Washington ("CREW"), designated as MUR 6200, on July 6, 2009, which was later supplemented on July 24, 2009. The Committees each submitted a written response to the complaint on August 11, 2009 (the "Responses to MUR 6200"), and the Commission voted to dismiss MUR-6200 as a matter of prosecutorial discretion and close the file on November 16, 2010. A Statement of Reasons providing the bases for the Commission's decision to dismiss the complaint was issued on November 17, 2011 (the "Dismissal Letter").

On May 23, 2011, Senator Ensign received the Commission's letter notifying him of Pre-MUR 520, and he was subsequently granted an extension to file a response on or before June 24, 2011. Lisa Lisker, the Treasurer for the Committees, received the Commission's letter notifying her of Pre-Mur 520 on June 9, 2011.

II. THE FACTS

On April 7, 2008, Michael and Sharon Ensign each made gifts to Doug Hampton, Cynthia Hampton, Brandon Hampton, and Blake Hampton in the form of a check totaling \$96,000. EXHIBIT A. The Gifts, made out of concern for the well-being of long-time family friends, were purposefully limited to \$12,000 each to comply with the applicable tax laws

allegations made in the Report of Preliminary Inquiry into the Matter of Senator John E. Ensign submitted to the United States Senate Select Committee on Ethics by Special Counsel.

governing gifts. See EXHIBITS B AND C. Since the Commission is considering whether the Payment constituted gifts, as Michael and Sharon Ensign believed and intended, or whether Senator Ensign "caused Michael and Sharon Ensign to make a severance to Cynthia Hampton," the following facts are relevant to the Commission's determination:

- Michael and Sharon Ensign are the parents of Senator Ensign.
- Cynthia Hampton had been a close personal friend of Senator Ensign and his wife for more than 20 years, and the Ensign and Hampton families had a close personal friendship during that time. Senator Ensign and his wife are the godparents for the Hampton children.
- In 2004, Doug and Cynthia Hampton moved to Las Vegas, Nevada. Shortly thereafter, Cynthia Hampton began working as the Assistant Treasurer for Ensign for Senate and Battle Born Political Action Committee. She became the Treasurer for Ensign for Senate on January 31, 2007, and the Treasurer for Battle Born Political Action Committee on February 12, 2008.
- In November 2006, Doug Hampton began working for Senator Ensign's official office in the U.S. Senate.
- In addition to working together, the Ensign and Hampton families spent much of their personal time together. This personal time included weekly Sunday meals and vacationing together.
- Due to the personal relationship between their families, as well as the Hamptons' financial difficulties, the Ensigs had provided the Hamptons with more than \$130,000 in financial assistance prior to the affair between Senator Ensign and Cynthia Hampton. Specifically:
 - On or about November 28, 2004, Senator Ensign and his wife gave Doug Hampton a \$15,000 unsecured loan that was eventually repaid without interest. EXHIBIT D. The loan was provided to the Hamptons so they could refinance their home.
 - On or about April 20, 2006, Senator Ensign and his wife paid \$600 for education expenses for the Hampton children. EXHIBIT E.

- On or about July 11, 2006, Senator Ensign and his wife gave Doug Hampton a \$25,000 unsecured loan. EXHIBIT F. The loan was provided to the Hamptons so they could refinance their home.
- On or about September 5, 2006, Senator Ensign and his wife paid \$15,170 for private school tuition for the Hampton children. EXHIBITS G AND E.
- Michael and Sharon Ensign paid for the entire Hampton family to vacation in Hawaii from December 26, 2006, to January 2, 2007, which included their flights on a private Gulfstream 4SP jet, a rental home with its own private 9-hole golf course, food, and recreational activities. EXHIBITS H, I, J, K, P AND Q. The total cost of the vacation that could be allocated to the Hamptons was at least \$30,000.
- On or about January 29, 2007, Senator Ensign and his wife paid \$4,500 for counseling for one of the Hampton children. EXHIBIT L.
- On or about July 17, 2007, Senator Ensign and his wife paid \$23,970 for private school tuition for the Hampton children. EXHIBITS M AND N.
- Although the exact date is unknown, but prior to the affair, Senator Ensign and his wife gave Doug and/or Cynthia Hampton a \$20,000 unsecured loan that was eventually forgiven verbally by the Ensigs.
- On or about February 4, 2008, Senator Ensign and his wife paid \$550 for books and private school activities for the Hampton children. EXHIBIT E.
- After Senator Ensign told his parents about the affair, Michael and Sharon Ensign decided to make gifts to members of the Hampton family, who had been family friends for more than 20 years.
- Michael and Sharon Ensign wanted to bestow gifts totaling approximately \$100,000; however, the total amount was reduced to \$96,000 so the gifts could be broken down into \$12,000 increments to comply with applicable gift tax laws.
- Senator Ensign did not request that either Michael and/or Sharon Ensign make the Gifts to the Hamptons, nor was there any discussion with Michael and/or Sharon Ensign that the Gifts would function, either in form or substance, as a severance payment to Cynthia or Doug Hampton.
- In April 2008, Michael Ensign instructed his Chief Financial Officer ("CFO") to make the Gifts, totaling \$96,000, to Doug, Cynthia, Brandon, and Blake Hampton from the

Ensign 1993 Trust. Michael and Sharon Ensign are the sole trustees of the Ensign 1993 Trust.

- According to the CFO, Michael Ensign did not provide further explanation for the Gifts, other than they were gifts.
- The CFO maintained a record of the Gifts in a file detailing all gifts made from the Ensign 1993 Trust. According to the CFO, there was “nothing out of the ordinary” about Michael Ensign’s request, and it is typical for Michael Ensign to request payments in \$12,000 increments when he is making a gift. The CFO was not aware of the affair between Senator Ensign and Cynthia Hampton until June 2009.
- The CFO prepared and signed the check, which was dated April 7, 2008.

III. APPLICABLE LAW

No person may make contributions to any candidate or his or her authorized political committee, such as Ensign for Senate, with respect to any election for Federal office that exceed \$2,000 (adjusted for inflation) per election.³ No person may contribute more than \$5,000 per year to a leadership PAC, such as Battle Born Political Action Committee. 2 U.S.C. § 441(a)(1)(C).

A “contribution,” as that term is defined in the Federal Election Campaign Act of 1971, as amended (the “Act”), includes loans made “for the purpose of influencing an election.” 2 U.S.C. §431(8)(A)(i); *see also* 11 CFR § 100.7(a)(1).

Contributions accepted by a candidate may not be converted to personal use by any person. 2 U.S.C. § 439a(b)(1); 11 CFR § 113.2(e). “Personal use” is defined as “any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation

³ During the 2008 election cycle, individuals could contribute up to \$2,300 per election to Federal candidates. *See Price Index Increases for Expenditure and Contribution Limitations*, 72 Fed. Reg. 5294, 5295 (February 5, 2007).

or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR § 113.1(g); *see also* 2 U.S.C. § 439a(b)(2).

Under the tax code, whether a transfer is considered a "gift" or not is a question of the giver's intent – a gift is any payment made "from a detached and disinterested generosity, out of affection, respect, admiration, charity or like impulses." *Commissioner v. Duberstein*, 363 U.S. 278, 285-86 (1960) (citations omitted).

IV. ANALYSIS

The Commission previously reviewed the allegation that Senator Ensign violated campaign finance laws and stated that "whether the payment at issue in this matter is a gift or an excessive contribution turns on the intent of [Michael and Sharon Ensign] in making the payment." *See* DISMISSAL LETTER at p. 10. When discerning Michael and Sharon Ensign's intent, the Commission appropriately did not give undue weight to third-party characterizations of the Payment and determined that the sworn affidavits submitted by Michael and Sharon Ensign constitute the only direct evidence of *their intent* in making the Payment. *See id.*

Senator Ensign presumes⁴ that the Commission's current inquiry is based substantially, if not entirely, on the allegations in the Report of Preliminary Inquiry into the Matter of Senator John E. Ensign (the "Report"), submitted to the United States Senate Select Committee on Ethics by Special Counsel. Senator Ensign acknowledges the gravity of the allegations levied against him in the Report and appreciates why the Commission would initiate further inquiry into the Payment to members of the Hampton family. The Report, however, contains one-sided

⁴ The Commission has not specifically identified the "information now in the Commission's possession" that warranted the initiation of Pre-MUR 520.

arguments that consciously ignore exculpatory evidence and relies on testimony by witnesses that the Special Counsel knew to be inaccurate *before* the Report was issued. Senator Ensign will not use this forum to address each of these deficiencies, but he does welcome the opportunity to respond to information contained in the Report that specifically relates to the allegation that the Gifts were intended to be a severance payment to Cynthia Hampton.

Given the previous conclusion of the Commission, the Report raises two discrete issues, neither of which changes the fundamental character of the Gifts from Michael and Sharon Ensign. The first is the Report's suggestion that Michael and Sharon Ensign did not pay for the trip to Hawaii and there was, therefore, no history of gift-giving to the Hamptons, as Michael and Sharon Ensign had claimed in their previous response to the Commission. As shown below, Michael and Sharon Ensign have proven through documentary evidence that they did pay for the trip to Hawaii and, at all times, intended to make gifts to members of the Hampton family. The Report's suggestion is thus discredited by the evidence. The second issue is the Report's suggestion that a third party's characterization of the gift, without more, defines the intent of the giver. This is a novel theory that is unsupported in a court of law. This is particularly true where the references made by third parties, including Senator Ensign and the Hamptons, regarding the "severance" terms were inconsistent and contradictory, reflecting the fundamental idea that the character of the Gifts are determined by the giver—not by other individuals. Ultimately, the allegations in the Report as they relate to the "severance" issue do not change the facts of what actually happened or the accuracy of the evidence already submitted by Senator Ensign. Each issue is discussed in more detail below.

A. The Report's Suggestion That Michael and Sharon Ensign Did Not Intend The \$96,000 As A Gift Is Discredited By The Evidence

The Report raises two issues regarding the intent of Michael and Sharon Ensign's Payment to the Hamptons. As shown below, these suggestions do not stand up to scrutiny, and despite these allegations, Senator Ensign stands by the affidavit that he previously provided to the Commission and his previous assertion that the Gifts were not related to Cynthia Hampton's employment by the Committees or any expense or debt that the Committees would have otherwise incurred. See EXHIBIT O; see also RESPONSES TO MUR 6200.

1. The Report's Suggestion That The Hawaii Vacation Was Not Paid By Michael And Sharon Ensign Is Contradicted By The Documentary Evidence

As the Commission is likely aware, the Report made the following related allegations regarding the "severance" issue:

A \$96,000 Payment to Mr. Hampton, Ms. Hampton, and two of their three children from the Ensign Family Trust Fund, made at the time the Hamptons were terminated from the Senator's employ, constituted a severance payment, and Senator Ensign's affidavit to the Federal Election Commission (FEC) that the payment was not severance is false.

Senator Ensign's parents' affidavits to the FEC are also misleading and potentially false. The affidavits stated that the \$96,000 Payment was part of their pattern of giving to the Hamptons, and cited payment of an all-expenses paid trip to Hawaii in 2006 for the Hamptons as support for this pattern of giving. The FEC credited and relied upon these affidavits in dismissing a complaint against Senator Ensign and his campaign, despite a recommendation by FEC staff counsel that an investigation be opened.

The Special Counsel concluded that Michael and Sharon Ensign may not have "paid for the Hampton family to vacation in Hawaii from December 26, 2006, to January 2, 2007," as both stated in their affidavits provided to the Commission in 2009. Senator Ensign presumes this

conclusion was based entirely on Michael and Sharon Ensign's apparent inability to recall during their testimony that they paid for any expenses for this trip other than by providing flights on a private jet, as there is no other evidence that would demonstrate otherwise.

The question of whether the vacations were paid by Michael and Sharon Ensign can be answered through straightforward documentary evidence. Following their testimony before the Special Counsel, Michael and Sharon Ensign reviewed their financial records and recalled paying for other expenses incurred by the Hampton and Ensign families on this Hawaii trip in the amount of roughly \$50,000, as evidenced by two checks from Sharon Ensign to Citibank to pay expenses for the trip charged to Senator Ensign and his wife's credit card. Copies of these two checks -- one for \$30,000 and dated "12-21-06" and one for \$17,000 and dated "1-30-07" -- are attached hereto as Exhibits P and Q. After recalling that they did "pa[y]" for the Hampton family to vacation in Hawaii from December 26, 2006, to January 2, 2007," Michael and Sharon Ensign's counsel, David R. Belding, contacted the Special Counsel and promptly submitted a copy of each check to demonstrate that Michael and Sharon Ensign did in fact paid for the Hamptons' trip. The Special Counsel, however, apparently preferred to use Michael and Sharon Ensign's obviously mistaken testimony—known by the Special Counsel to be inaccurate—to form the basis of multiple allegations against Senator Ensign in lieu of the clear documentary evidence before them.

Thus, despite the allegations in the Report, the factual assertions previously made to the Commission are confirmed by independent evidence.

2. Whether The \$96,000 Was Intended To Be A Gift Does Not Depend On Whether The Ensigns Had Given A Gift Before

As the Commission is likely aware, the Report made the following allegation regarding the "severance" issue:

There was no evidence of any pattern of giving from Michael or Sharon Ensign to the Hamptons. The senior Ensigns and Mr. Hampton had a contentious relationship not conducive to large monetary gifts and a pattern of giving, and had never directly given the Hamptons a gift before. Additionally, the senior Ensigns had never given a single gift from the Ensign Family Trust Fund of the size of the Hampton payment to any non-family member, and also had no pattern or practice of giving significant gifts to any friends of their children.

In essence, it is the Special Counsel's view that the alleged absence of a previous substantial gift (i.e., expenses for the Hawaii trip) provided by Michael and Sharon Ensign to, or for benefit of, the Hamptons constitutes some degree of evidence that the check for \$96,000 was not a gift to the Hamptons. To begin with, Michael and Sharon Ensign did pay for the entire Hampton family to vacation in Hawaii from December 26, 2006, to January 2, 2007, and the total cost of the vacation that could be allocated to the Hamptons was at least \$30,000.⁵ Because Michael and Sharon Ensign had, in fact, been extremely generous to the Hamptons prior to the Payment, the Report's conclusion is based on an erroneous factual assumption.

⁵ It is worth noting to the Commission that Senator Ensign recalls three additional instances in which Michael and Sharon Ensign substantially subsidized the Hampton family. First, Senator Ensign recalls that the Hampton family flew to the State of Washington on a private jet provided free-of-charge by Michael and Sharon Ensign, and the Hampton family stayed free-of-charge at Michael and Sharon Ensign's vacation home there with Senator Ensign's family. Second, Senator Ensign recalls that Doug and Cynthia Hampton flew to Washington, D.C. to attend the National Prayer Breakfast on a private jet provided free-of-charge by Michael and Sharon Ensign. Third, Senator Ensign recalls that the Hampton children have vacationed multiple times with Senator Ensign's family in Del Mar, California, and they stayed free-of-charge at Michael and Sharon Ensign's vacation home there.

Nevertheless, and simply for the sake of argument, whether the \$96,000 was intended to be a gift does not depend on whether the Ensigns had given a gift before. One does not follow the other.

3. Senator Ensign's Use Of The Word "Severance" Does Not Change The Substance And Intent Of His Parents' Payment

As the Commission is likely aware, the Report made the following allegation regarding the "severance" issue:

Senator Ensign referred to the payment as severance on multiple occasions, including: (1) during an emergency staff meeting on June 15, 2009, when he disclosed his affair with Ms. Hampton to his Senate office staff; (2) in multiple drafts of a public statement in which the Senator publicly disclosed an affair with Ms. Hampton; (3) in credible testimony from at least four witnesses, one of whom stated that Senator Ensign said "I'm going to give him as mach severance as possible"; and (4) in his own personal journal entries, written in June 2009, over a year after the payment was made, describing his intent to "help them transition into their new life."

In its Dismissal Letter, the Commission stated, "[W]hether the payment at issue in this matter is a gift or an excessive contribution turns on the intent of the Ensigns in making the payment." Indeed, according to the Dismissal Letter, the Commission has already considered the following evidence:

- "On the issue of the payment made to the Hampton family, Mr. Hampton provided what he contended were his handwritten notes from the phone call detailed above that appear to discuss possible severance payments for Doug and Cynthia Hampton. These notes, dated '4/2/08' and written on Ensign office stationery, read: 'Exit strategy and severance for Cindy, Exit strategy and severance for Doug, Communication Plan for NRSC and official office, NO CONTACT WHAT SO EVER WITH CINDY!'" See DISMISSAL LETTER at p. 7.
- "Another exhibit to the online article was a page of handwritten notes entitled 'Record of discussions with John Ensign.' This page details what Doug Hampton represents as notes from three phone conversations with John Ensign on April 2. Notes of the first call,

which was at 9:40 a.m., include information similar to that discussed above, and it appears to be the same phone call. The second call was at noon, and the notes detail further discussions of a plan for a new job for Doug Hampton, including that "[w]e discussed timing of departure JE agreed for me to stay on thru April - Better for client building.' The third call was at 7:30 p.m., with the notes stating 'John called asked it was OK to share the outlines of a plan. - Doug - 2 mn. severance, continue client building; - Cindy - 1 year salary; - Discussed gift rules and tax law; - Shared a plan to have both he and Darlene write ck's in various amounts equaling 96K. - He asked if the offer was OK and did I agree - I said I would need to think about [sic] and would get back with him.'" See *id.*

- "Mr. Hampton has publicly reiterated his assertion that the \$96,000 Payment was a severance payment, most notably in a November 23, 2009, interview on the television program 'Nightline' and an accompanying article published on ABC News' website (<http://abcnews.go.com/print?id=9140788>, last visited on January 14, 2010). In that article, the payment was discussed as follows: 'The Ensign family has said the \$96,000 was a gift and not severance... Hampton told 'Nightline' the opposite, saying it was 'crystal clear' that the \$96,000 was, in fact, severance and not a gift. 'Crystal clear,' Hampton said. 'I took notes. I've shared those notes. They're well documented. They were clear what he deemed as severance.'" See DISMISSAL LETTER at p. 8.

Thus, the Commission has considered numerous references to "severance" made by Senator Ensign and, with respect to this evidence, already determined that the sworn affidavits submitted by Michael and Sharon Ensign constituted the only direct evidence of *their intent* in making the Payment.

As shown below, Michael and Sharon Ensign, at all times, intended to make gifts to members of the Hampton family, and Senator Ensign's use of the word "severance" does not change substance and intent of the Payment.

1. It Was Michael And Sharon Ensign's Intent To Make Gifts And Not Campaign Contributions

Senator Ensign acknowledges that he wanted to provide some money to the Hamptons to compensate them for his actions, in the sense of making some reparation, expiation or amends to

them, to make them whole. Regardless of Senator Ensign's alleged state of mind (which is discussed in more detail further below), it does not directly bear on *his parents'* independent intentions to provide gifts to members of the Hampton family. The Gifts were no more related to the Committees' operations than were the payments for the Hamptons' Hawaii vacation or the payments for the Hampton children's private school tuition, both of which occurred while Cynthia Hampton served as Treasurer to the Committees. Once again, consider the evidence regarding Michael and Sharon Ensign's state of mind:

- Michael and Sharon Ensign signed affidavits stating that they intended to make gifts out of concern for the well-being of long-time family friends, and there was no discussion with Senator Ensign that the Gifts would function, either in form or substance, as a severance payment.
- Michael and Sharon Ensign gave the check structured in a way – payments of \$12,000 from each of the two individuals to four different individuals – to specifically conform to gift tax requirements, because the check was, and was intended to be by them, a gift from them to members of the Hampton family.
- Michael Ensign instructed his CFO to make the Gifts from the Ensign 1993 Trust, and he did not provide any further explanation to the CFO, other than they were gifts. The CFO recorded the payment as a gift in a document, entitled "Mike + Sharon Ensign 2008 Gift Record," in which all other gifts made by Michael and Sharon Ensign in 2008 were presumably recorded.

In summation, Michael and Sharon Ensign, at all times, intended to make gifts to members of the Hampton family.

2. The Hamptons' Alleged Intent Is Questionable

The Commission already acknowledged in its Dismissal Letter that, under the tax code, whether a transfer is considered a "gift" is a question of the *giver's* intent. See DISMISSAL LETTER at p. 9. As such, the Hamptons' state of mind is irrelevant other than to help discern

Michael and Sharon's intent, but it is an issue worth addressing nonetheless. The Dismissal Letter noted that "publicly available information suggests that the Hamptons viewed the \$96,000 as a severance payment and not as a gift," which is also consistent with Cynthia Hampton's testimony that was cited in the Report. Despite the Hamptons' supposed view that the \$96,000 was severance, however, they notably have not released their 2008 tax returns demonstrating that this money was treated as income, which is how a severance payment would have been treated for tax purposes. Since the Special Counsel obtained testimony and documents from the Hamptons, one can infer that the glaring absence of any references in the Report to the Hamptons' 2008 tax return means that the Hamptons treated the Payment as gifts. And while the Hamptons' tax treatment of the Payment cannot, in and of itself, conclusively discern Michael and Sharon Ensign's intent, it certainly calls into question their own.

3. Senator Ensign Used A Term Incorrectly And Loosely Without A Legal Meaning In Mind

Senator Ensign acknowledged to the Senate Ethics Committee that, both before and after his parents provided their gift check to the Hamptons, he did on occasion use the word "severance" loosely in connection with money provided, or potentially to be provided, to the Hamptons. On December 16, 2009, for example, Senator Ensign provided the Senate Ethics Committee with a June 16, 2009, draft public statement in which he used the phrase "the equivalent of six months severance." As shown above, however, Senator Ensign's use of the word "severance," without more, is irrelevant to the intent of *Michael and Sharon Ensign*.

In fact, Senator Ensign's use of "severance" shows why third-party references untethered to the giver's intent should not be used to determine whether something was a gift. He never

used, or intended to use, the word “severance” with any fixed or specific meaning, and certainly not with any legally defined meaning, and his loose use of “severance” shows why third-party references untethered to the givor’s intent do not determine whether something was a gift. Indeed, neither the Senate Ethics Committee nor the Commission has indicated to Senator Ensign what the operative definition of “severance” is or has been in this matter, perhaps in part because “severance” is simply not a specifically defined legal term of art. The Commission should acknowledge that people often use the word “severance” loosely, and that non-lawyers in particular often use words that may also have legal meaning inaccurately. That is the case here.

The totality of the evidence before the Commission establishes that Senator Ensign’s did not describe the Gifts as “severance” with any fixed or specific meaning. As shown below, e-mails and testimony cited in the Report reveal instances in which Senator Ensign’s “loose” use of the word “severance” is evident. These instances are described in detail below.

a. “Severance” Versus “the Equivalent of Severance”

In the first version of a draft statement written by Senator Ensign and dated June 16, 2009, at 7:57 a.m., the Senator wrote:

Because of this affair, an unsustainable work atmosphere had developed and it became apparent they could no longer work for me. To help them transition to new work, we gave them *what was the equivalent of* 6 months severance pay and 1 year of health insurance expense personally, not out of campaign or official accounts.

(emphasis added). The Report cites this draft statement as key evidence giving rise to the allegation that Senator Ensign paid severance to Doug and Cynthia Hampton, but the Special Counsel fails to parse Senator Ensign’s statement carefully. The Report does not answer the

question: Why did Senator Ensign use the phrase "*what was the equivalent of 6 months severance pay and 1 year of health insurance expense*" if he was referring to actual severance? (emphasis added). Indeed, Senator Ensign's use of the phrase "*what was the equivalent of severance*" implies that the Payment was not, in fact, for severance. The full subtext of Senator Ensign's draft statement may have been ignored by the Special Counsel, but we respectfully urge the Commission to consider this evidence more discerningly.

h. Inconsistency Regarding The Terms Of The Alleged Severance

If the Commission examines the evidence cited in the Report relating to the terms of the alleged severance payment, then it will find that the only consistency with this evidence is the fact that the supposed severance terms are inconsistently described. Once Senator Ensign disclosed that he had made "*what was the equivalent of ... severance,*" he had no motive to change the terms of the alleged severance payment or describe the terms inconsistently (i.e., the allegation that the \$96,000 was intended as a severance payment is relevant the determination of whether the payment constituted an excessive campaign contribution, whereas as the specific terms of the alleged severance payment have no bearing on his potential culpability). As such, the following inconsistencies help demonstrate that Senator Ensign never used, or intended to use, the word "*severance*" with any fixed or specific meaning, and certainly not with any legally defined meaning, with respect to the Gifts made by Michael and Sharon Ensign.

According to the Report, Cynthia Hampton testified to the following regarding the terms of the alleged severance payment:

Ms. Hampton expected a check from Senator Ensign for *one year severance* for herself (\$50,000) and *two months severance* for Doug Hampton (approximately \$24,000), or approximately \$74,000 in total.

(emphasis added). According to her testimony, "Ms. Hampton spoke to Senator Ensign by phone and asked how he arrived at the check amount. Senator Ensign informed her that she could put the extra money toward her health insurance." Her testimony would mean that Senator Ensign estimated the cost of one year of health insurance expenses to be approximately \$22,000.

Cynthia Hampton's testimony, however, is directly contradicted by an e-mail sent by Doug Hampton to Senator Ensign on May 30, 2008, stating:

Forget the severance that [sic] was not part of the deal and that was for Cindy having to leave her job. *There was no severance for me* as you stated it was not possible with government employees.

(emphasis added). In addition to contradicting his wife's testimony, Doug Hampton's assertion that the Payment was intended to serve only as severance to Cynthia Hampton is belied by the fact that the amount of the severance would equal almost two full years of Cynthia Hampton's salary—an excessively disproportionate amount that is not indicative of a severance package.⁶ The "severance" terms described in Doug Hampton's e-mail are also inconsistent with the first version of a draft statement written by Senator Ensign and dated June 16, 2009, at 7:57 a.m., which the Special Counsel considered key evidence. In that draft statement, the Senator wrote:

Because of the affair, an unsustainable work atmosphere had developed and it became apparent they could no longer work for me. To help them transition to new work, we gave them what was the equivalent of *6 months severance pay* and

⁶ The Report stated that "[t]he part of the payment that was severance to Mr. Hampton would also constitute an improper unofficial office account as it was a payment from a private person." The Report fails to explain, however, how the Special Counsel concluded that Michael and Sharon Ensign had paid severance to Doug Hampton without reconciling – or even acknowledging – the contemporaneous and contradictory e-mail written by Doug Hampton.

1 year of health insurance expense personally, not out of campaign or official accounts.

(emphasis added). The problem with these “severance” terms, as they are described by Senator Ensign, is that they are contradicted by the actual amount of Michael and Sharon Ensign’s \$96,000 Payment. Assuming that Senator Ensign still estimated the cost of one year of health insurance to be \$22,000, then a severance equal to six months of Cynthia Hampton’s salary and one year of health insurance expenses means Michael and Sharon Ensign’s Payment should have been approximately \$72,000 (\$50,000 for salary and \$22,000 for health insurance), but not \$96,000.⁷

Furthermore, these “severance” terms are inconsistent with the testimony provided by Senator Ensign’s former Communications Director, Rebecca Fisher. The Report states:

[Ms.] Fisher testified that Senator Ensign “said that he tried to – he wanted to make [Hampton] whole, that he had calculated *three months of pay* for [Hampton] and then *three months of pay* for [Ms. Hampton] and had gotten a total, and then he’d also taken into account what *health insurance* would cost for the family, and that he had given them money to cover that.

(emphasis added). See THE REPORT at pp. 38-39. While there is no reason to question the veracity of Ms. Fisher’s testimony or dispute that Senator Ensign may have described the Payment in this manner during an emergency staff meeting that began in the late evening of June 15, 2009, the Commission should note that these “severance” terms would have resulted in a

⁷ The \$72,000 calculation for this example also assumes that only Cynthia Hampton received severance, although this assumption is questionable given that Senator Ensign’s statement does not specify that Doug Hampton did not receive severance. Had Doug Hampton also received severance equal to six months of his salary, then Michael and Sharon Ensign’s Payment should have been approximately \$144,000, but not \$96,000.

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payment of approximately \$70,500,⁸ but not \$96,000. With respect to this emergency staff meeting, it is undisputed that Senator Ensign told his staff that he – not Michael and Sharon Ensign – had made the Payment to the Hamptons. The Report, therefore, ignores the fact that Senator Ensign did not accurately describe the circumstances of the Payment to his staff while simultaneously giving full weight to other statements made by Senator Ensign during the meeting that could be used to support the Special Counsel's allegations. This is one of the many instances in which the Special Counsel chose to selectively cherry-pick the evidence that supported their desired findings, as opposed to conducting an independent and unbiased examination of the evidence before them.

Finally, the Report cites a second draft of the statement prepared by Senator Ensign and dated June 16, 2009, at 1:18 p.m., in which the Senator wrote:

Last year, my wife and I decided to give what would be the equivalent of six months severance to each of them out of our personal funds. Let me be clear: These were strictly personal funds. This was to get them transitioned into new work.

(emphasis added). Not only is this draft statement inconsistent with his first draft statement, which was written no more than six hours earlier the same day, it also directly contradicts the testimony provided by Cynthia Hampton.

The Report may make it apparent that Senator Ensign referred to the payment as "severance" on multiple occasions (which he readily acknowledges), but the Report also makes it apparent that Senator Ensign – nor any of the other relevant witnesses in this matter – could not

⁸ Assuming once again that Senator Ensign estimated the cost of health insurance expenses for one year to be \$22,000.

describe the terms of the alleged "severance" with any consistency. The only notable consistency with respect to the alleged severance payment, therefore, is the fact that Michael and Sharon Ensign independently intended to make gifts and purposefully structured the Payment to comply with the applicable tax laws governing gifts. As such, Senator Ensign respectfully urges the Commission to give more credence to Michael and Sharon Ensign's own intentions regarding the Payment, as opposed to playing word games with Senator Ensign's use of the term "severance" (i.e., arguing that the names of things should control rather than their substance).

4. Treating The Payment As A Campaign Contribution Would Have Violated The "Irrespective" Test

The tax code permits Michael and Sharon Ensign to make gifts to the Hampton family, so the Commission must simply determine whether the Payment constituted gifts or an in-kind contribution to the Committees. Notably, a contribution is defined as "anything of value provided for the purpose of influencing an election," but it does not include payments for the personal expenses of a candidate if they would have been made irrespective of the candidacy. *See* Commission MUR 5141 ("[A]lthough Section 113.1(g)(6) of the Commission's regulations treats some third party payments as contributions, it provides that payments made irrespective of the candidacy are not to be so treated"). Furthermore, "the Act unambiguously requires that a loan be made for the purpose of influencing a candidate's election to federal office." *See id.* (citing 2 U.S.C. 431(8)(A)(i)).

It is Senator Ensign's belief that Michael and Sharon Ensign did not make the Gifts for the purpose of influencing his 2012 candidacy for U.S. Senate, and that they would have made the Gifts irrespective of his candidacy. Indeed, Senator Ensign believes that treating his parents'

constitute a campaign contribution, then it is absolutely preposterous that she could believe that the Gifts from Senator Ensign's *parents* (who had a long-standing relationship with the Hamptons and cared dearly about the Hampton children and the impact the affair would have on them) was somehow illegitimate.

IV. CONCLUSION

The evidence, in its totality, shows that the \$12,000 monetary gifts that Michael and Sharon Ensign each provided to Doug Hampton, Cynthia Hampton, Brandon Hampton, and Blake Hampton were not related to Cynthia Hampton's previous employment by the Committee, nor were they related to any expense or debt that the Committee would have otherwise incurred. For this reason, Senator Ensign respectfully urges the Commission to find that there is no reason to believe that he violated the Federal Election Campaign Act of 1971, as amended, and choose not to pursue this matter any further.

Thank you for your consideration of this request, and please do not hesitate to contact me at (214) 842-6829 if you have any questions.

Sincerely,



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